INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	16
Conclusion	25
Appendix	26

CITATIONS

Cases:	Page
Arizona v. *California*, 283 U. S. 423	22
Armand Co., Inc. v. *Federal Trade Commi*	17
certiorari denied, 299 U. S. 597	17
Baltimore & Potomac Railroad Co. v. *Cu*	17
232	18
Berger v. *United States*, 295 U. S. 78	18
Consolidated Edison Co. v. *National Lab*	18
305 U. S. 197	21
Fort Wayne Corrugated Paper Co. v. *Na*	17
tions Board, 111 F. 2d 869	17
Helvering v. *Cowran*, 302 U. S. 238	24
Nash v. *Towne*, 5 Wall. 689	24
National Labor Relations Board v. *Alumi*	19
120 F. 2d 567	19
National Labor Relations Board v. *Citizen*	18, 22
2d 962	18, 22
National Labor Relations Board v. *Mack*	18
graph Co., 304 U. S. 333	18
National Labor Relations Board v. *Piqu*	18
Products Co., 109 F. 2d 552	18
National Labor Relations Board v. *Sands*	24
332	24
National Labor Relations Board v. *Stand*	24
2d 885	24
National Labor Relations Board v. *Weirto*	18
2d 494	18
National Labor Relations Board v. *Yale &*	
114 F. 2d 376	

Cases—Continued.

Page

Pittsburgh Plate Glass Co. v. *National Labor Relations Board*, 313 U. S. 146, affirming 113 F. 2d 698 24
Poultrymen's Service Corporation, Matter of, 41 N. L. R. B. 444, enforced, 138 F. 2d 204 20
Riley Investment Co., J. E. v. *Commissioner of Internal Revenue*, 311 U. S. 55 21
Ritzwoller Co., M. H. v. *National Labor Relations Board*, 114 F. 2d 432 18
Southport Petroleum Co. v. *National Labor Relations Board*, 315 U. S. 100 24
Swift & Co. v. *Hocking Valley Ry. Co.*, 243 U. S. 281 22
Swift & Co. v. *National Labor Relations Board*, 106 F. 2d 87 .. 21
Utah Copper Co. v. *Railroad Retirement Board*, 129 F. 2d 358, certiorari denied, 317 U. S. 687 21
Washington & Georgetown Railroad Co. v. *Hickey*, 166 U. S. 521 17
Western Cartridge Co. v. *National Labor Relations Board*, 134 F. 2d 240, certiorari denied, 320 U. S. 746 24

Statute:

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):

Sec. 7 26
Sec. 8 (1) 26
Sec. 8 (3) 26
Sec. 8 (5) 26
Sec. 10 (c) 21, 24, 26
Sec. 10 (d) 21, 24, 27
Sec. 10 (e) 21, 24, 27

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1166

GREATER NEW YORK BROADCASTING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 64–67) [1] is reported in 147 F. 2d 337. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 1–145) are reported in 48 N. L. R. B. 718.

[1] The two volumes printed by the Board as an appendix to its brief in the court below are herein referred to as "B. A.," the volume printed by petitioner as an appendix to its brief in the court below is referred to as "R. A.," and volume IV of the transcript of record in this Court is referred to as "R."

JURISDICTION

The decree of the court below (R. 68–71) was entered on February 26, 1945. The petition for a writ of certiorari was filed on April 16, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether an order of the National Labor Relations Board must be denied enforcement solely because the complaint alleged that petitioner, in violation of Section 8 (3) of the National Labor Relations Act, had discharged certain striking employees on or about November 3 and 4, 1940, and had failed to reinstate these employees thereafter, while the Board, notwithstanding this allegation and petitioner's admission in its answer that it had discharged the employees albeit for cause, found that petitioner had not discharged its employees but had violated Section 8 (3) by refusing to reinstate the striking employees on about December 6, 1940.

2. Whether, in the light of all the circumstances, the Board and the court below abused their discretion in denying petitioner's motions to adduce additional evidence.

3. Whether there is substantial evidence to support the Board's findings (a) that on and after November 4, 1940, petitioner had no bona fide

doubt that a majority of its employees within an appropriate bargaining unit had designated the Union to represent them; and (b) that a strike called by the Union was prolonged by petitioner's unfair labor practices.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 26–28.

STATEMENT

Upon charges filed by the Union, Local 16 of the American Communications Association, C. I. O., the Board issued its complaint alleging, *inter alia*, that petitioner had discharged 33 employees on or about November 3 and 4, 1940, and thereafter refused to reinstate 21 of them and delayed reinstatement of 12 others "because they joined and assisted the Union and * * * engaged in a strike and other concerted activities for the purpose of collective bargaining and other mutual aid or protection" (R. A. 333–336, 339–340); that petitioner had refused to bargain with the Union and otherwise interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act (R. A. 337–339); and that these unfair labor practices had caused and prolonged a strike which began on or about November 3 and 4, 1940 (R. A. 339). Petitioner filed an answer denying that it had

engaged in any of these unfair labor practices and alleging that it had discharged 15 of the employees named in the complaint and thereafter refused to reinstate 14 of them, but that the discharges and refusals to reinstate had been for good and sufficient cause and not for discriminatory reasons as alleged in the complaint, and that the other employees had voluntarily left petitioner's employ and had been replaced by new permanent employees (R. A. 342–350).

A hearing was had before a trial examiner who thereafter issued his intermediate report in which he found that petitioner (1) in violation of Section 8 (5) of the Act refused to bargain collectively with the Union and otherwise interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed to them by the Act, thereby prolonging a strike which had been called by the Union; (2) in violation of Section 8 (3) of the Act discriminated in regard to the hire and tenure of its striking employees after they applied for reinstatement, by denying reinstatement to 21 of them and delaying reinstatement of, and otherwise discriminating against, others; and (3) by these and other acts engaged in unfair labor practices in violation of Section 8 (1) of the Act (B. A. 107, 109, 115–135). Petitioner thereupon filed with the Board exceptions, a brief, and a motion to reopen the record for the purpose of introducing additional evidence to support testimony which

it alleged that the trial examiner had not credited (B. A. 1, R. 50). The Board, on March 30, 1943, issued its decision and order adopting, with exceptions not here material, the report of the trial examiner and denying petitioner's motion to adduce additional evidence (B. A. 1–8). The Board's findings, together with the evidence in support thereof, insofar as they are pertinent to the issues here involved, may be summarized as follows:[2]

Through a process of gradual accretion, the Union, by 1940, had come to represent three groups of petitioner's employees—announcers, technicians, and sound effects men, and had closed-shop contracts with petitioner covering them (B. A. 18–19; 197–199, 216–217, 356, 457–459, 469). By the time the contracts expired simultaneously on October 1, 1940, the Union claimed to have been designated by a majority of the employees not only in these three groups, but also in another group of "miscellaneous employees," and requested petitioner to bargain with it for the four groups as one unit (B. A. 18–19, 24, 25–26; 199, 436–438, 445–446). Petitioner refused to do this and based its refusal on an alleged doubt that the Union had been designated by a majority of the employees

[2] In the following statement "B. A." references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting testimony.

within the miscellaneous group (B. A. 24, 25–26; 437–438). The Union thereupon agreed to file and did file with the Board's Regional Office a petition requesting the Board to investigate and certify the collective bargaining representative within the allegedly appropriate four-group unit (B. A. 26; 400, R. A. 461).[3]

Subsequent events, however, made it unnecessary for the Board to proceed with the representation petition. Petitioner and the Union entered into a compromise arrangement whereby bargaining on substantive terms and conditions of employment was to proceed without regard to the unit and representation questions, and the terms agreed upon were to be embodied in separate contracts for each of the groups involved (B. A. 35; 454–455, 513–515, 666–668, 928–929). The extent of the Union's representation of the miscellaneous employees, the only group in which petitioner questioned the Union's majority status, was then to be decided by an election among the miscellaneous employees, the outcome of which was to determine whether petitioner would bargain with the four groups as a single unit (B. A. 35–36; 454–455, 513–515, 666–668, 928–929). Negotiations on this basis proceeded until the afternoon of November 3, 1940, when the Union, believing that petitioner was not

[3] The Board's finding (B. A. 97–98) that the four groups in fact constitute a single appropriate bargaining unit is not here in issue.

bargaining in good faith, called a strike (B. A. 36, 40–41; 450–451, 455–456, 469–470, 691, 916–918, 961). On the following morning, November 4, petitioner summoned to its offices many of the miscellaneous employees and confronted them with a choice of remaining "loyal" to petitioner and staying at their jobs or of joining the strike and losing their jobs (B. A. 46–48; 700–701, 712, 713–714, 719, 721, 729–730, 734, 735). A majority of the miscellaneous employees, all but two of those interviewed, decided to participate in the strike (B. A. 47–48; 1012, 1016, 1285–1286). Petitioner, by thus polling the individual miscellaneous employees, not only resolved any doubt which it might theretofore have entertained concerning the Union's representation of a majority of that group, but it also resolved any doubt which it might have entertained toward the propriety of a four-group unit since petitioner's real objection to the single unit was based upon its doubt that the Union actually represented the miscellaneous employees (B. A. 101, 106).[4]

Petitioner attempted to induce not only the miscellaneous employees but also the other strikers

[4] Union representatives, after learning of petitioner's interviews with the individual miscellaneous employees on the morning of November 4, complained to a Board field representative that petitioner was attempting to intimidate those employees and requested that the representation petition theretofore filed be "tabled" (B. A. 50; 1298–1299).

644504—45——2

to abandon the Union and return to work. On the morning of November 4 it informed one of the striking engineers that "All you people who refuse to come back to work are through" (B. A. 48–49; 236–237, 349). On the same morning, when petitioner's representatives arrived at the transmitter in New Jersey, they urged two strikers, who had been delegated by the Union to guard the transmitter, to return to their posts and put the station back on the air, warning them that if they remained on strike they would never be reinstated (B. A. 45; 1014–1015, 1164–1165, 1250–1251). During the next few days, petitioner made similar attempts to induce other strikers to abandon the Union and return to work (B. A. 58–59; 1093–1094, 1097–1100, 1150).

Petitioner admittedly refused to bargain with the Union on and after November 4 (Br. 36; B. A. 109). On that date, the Union made efforts, through the Board's regional office and the New York State Mediation Board, to arrange bargaining conferences with petitioner (B. A. 2, 49–50; 548, 1103–1104, 1189–1191, 1199–1200). To the Board representative, petitioner stated that it would not meet with the Union until the employees abandoned the strike, explained certain conditions labeled "sabotage" by petitioner, and informed petitioner of the whereabouts of some of its property (B. A. 50–51; 1191–1192, 1195, 1198–1199, 1202, 1205–1206, 1298). To the state mediator,

petitioner stated that it would not meet with the Union because the latter had called a strike in the face of arrangements for another conference and because of the commission of certain undesignated acts of "sabotage" by the strikers (B. A. 49; 1106–1107). To the Union's letter of November 6, "again asking for a meeting to negotiate a contract", petitioner's general manager replied, *inter alia,* that the employees present "when the decision was made to take the station off the air thereupon retired and left our employment," and that responsibility for "acts of omission and commission which evidently occurred at the time the station was taken off the air * * * must be established and to which I feel that under the circumstances you should lend your assistance" (B. A. 56–58; 1306–1309). Thereafter, at a meeting of the Union and petitioner with a Board field examiner on November 8, and in subsequent correspondence with the Union, petitioner took the position that it was investigating the responsibility of strikers for having taken the station off the air and for having, it believed, tampered with its equipment at the studios and transmitter, and that it did not intend to reinstate any employees guilty of these acts (B. A. 59–60, 61–62; 405, 410–411, 545–546, 549–550, 1315, 1317–1318).

By its interviews with the miscellaneous employees, its threats and other statements to them and to other employees on November 4 in attempt-

ing to induce them to abandon the strike, and by its refusals to bargain with the Union on November 4 and thereafter, petitioner engaged in unfair labor practices which prolonged the strike (B. A. 107, note 84, 109).

On December 5, the Union called off the strike and requested petitioner to reinstate the strikers (B. A. 65; 411–412, 1319). Petitioner replied on the following day, stating that it had "forthwith discharged," for having tampered with the equipment or aided or abetted other employees in doing so, 15 of the strikers whom it did not name and whose number it said might be increased or decreased as a result of further investigation; it stated further that there were a few jobs available for strikers whom it believed innocent of misconduct (B. A. 65–69; 412, 1320–1323). Thereafter the strikers made individual applications for reinstatement at which time they were questioned concerning the whereabouts of themselves and of other employees at the time the strike was called and concerning the alleged tampering or "sabotage" (B. A. 74–76; 552, 560–561, 616–629, 645–656, 722, 730, 738–740).[5] It was not until December 21, after it had interviewed these employees, that petitioner furnished the names of any employees whom it allegedly refused to reinstate

[5] Electrical transcriptions of these interviews were made, but petitioner refused to produce them at the hearing (B. A. 76–77; 153–155, 417–428, 556–559, 624–625, 652–656).

because of misconduct (B. A. 81–83; 737, 1302–1303).[6] Its selection of these names, petitioner concedes, was not based on a discovery that any striker had actually engaged in the alleged tampering or "sabotage," but merely on information that he was either at the studios or transmitter at the time the strike occurred or shortly thereafter (B. A. 123–124; 991–992, 995, 1036).

Through one Holt, an engineer hired by petitioner to put the station in operation after the strike started, petitioner introduced voluminous evidence of the method of operating its station, the condition in which Holt found the equipment, and his difficulties in putting it in operation when he arrived at the studios several hours after the strike commenced and at the transmitter the following morning (B. A. 123–128; 751–775, 778–867, 885–898). Some of the difficulties encountered by Holt arose out of his lack of familiarity with the type of equipment in use at the station and the manner in which it was customarily operated by the regular staff, some of whom had built part of the equipment (B. A. 124–125; 581–582, 597, 612,

[6] Even on that date petitioner stated that its investigation as to the guilt of individual employees was "still pending" (B. A. 80; 415, 1329–1332). It then listed 12 employees whom it believed to be guilty (B. A. 82; 737, 1302–1303). It later added three names to the list, then subtracted one with the explanation that during an interview one of the employees had cleared himself of guilt (B. A. 82–83; 973, 980–981).

755–756, 760–761, 769–770, 779, 784–785, 804–816, 833, 837–838, 847, 1062, 1151–1153, 1216, 1241-1243, 1265–1266, 1268–1271, 1276–1277); other difficulties were accounted for by the fact that certain repairs were not being made on the transmitter because it was at that time being replaced by new equipment (B. A. 125; 673, 827–828, 1070-1071, 1124–1125, 1150–1151, 1156–1158, 1241-1242); still other difficulties were occasioned by construction work in progress night and day at the transmitter, causing the employees, out of regard for the safety of the construction workers, to devise substitutes for some of the equipment and to disconnect other portions of it when it was not in use (B. A. 125; 317–318, 799–802, 922, 930–932, 1054–1060, 1063–1064, 1071, 1156–1158, 1217–1222). Despite these facts, petitioner attributed to "sabotage" all conditions which Holt described as abnormal (B. A. 123; 831–832). But, upon all the evidence, the record does not establish that the Union or any of the strikers, rather than other persons who had access to the premises, participated in the commission of "sabotage," if any was committed (B. A. 128; 304, 307, 752, 775, 936-937). Moreover, "any belief which [petitioner] may have entertained concerning any conditions which may have been found was secondary in determining [petitioner's] course of conduct to its primary determination to make good its threat to the strikers of loss of employment and to avoid

dealing with [the Union] for any group of its employees" (B. A. 128).

Petitioner attempted to prove that it discharged 15 of the strikers on November 3 or 4 (B. A. 116; 405–406, 947–948, 967–969, 972–975, 998–1001, 1034–1036). But as shown *supra*, pp. 7–8, on November 4, after it had completed an examination of the equipment at its studios ((B. A. 1337–1341), petitioner not only sought to induce the strikers to return to work by threatening a loss of their jobs if they remained on strike, but refused to bargain with the Union unless the strikers first returned to work. During the ensuing weeks of the strike, petitioner repeatedly indicated that it had not identified any of the strikers whom it allegedly suspected of "sabotage" and that its investigation was continuing. Moreover, in reporting to the Division of Placement and Unemployment Insurance in December on the unemployment of some of the strikers whom it claimed to have discharged on November 3 and 4 for "sabotage" and misconduct, petitioner reported a labor dispute rather than misconduct as the reason for their idleness (B. A. 118; 943–946, 1303–1304, Union Exh. 12). The petitioner "did not actually discharge any of the strikers on November 3 and 4, but rather used threats of loss of employee status in an attempt to break the strike and later used the contention that it had discharged

employees for sabotage as a subterfuge to avoid bargaining with [the Union]" (B. A. 116–117).

Petitioner refused to displace with a striker any person hired subsequent to its unfair labor practices on November 4 (B. A. 119–120; 567–568, 1000, 1322). As vacancies occurred, the strikers had to compete on an equal basis with other applicants who had not theretofore worked for petitioner (B. A. 119–120; 703–709, 730). Those reinstated were hired as new employees, losing seniority privileges which they had enjoyed prior to the strike, and sometimes being placed in different and inferior positions to those they had formerly held (B. A. 119–122; 412, 414, 1322–1323, 1326–1327). Seven employees, in addition to those whom petitioner allegedly discharged and failed to reemploy, were never reinstated either because they refused to accept less desirable positions than they had formerly held or because petitioner contended that no work was available for them (B. A. 116; 722–723, 725–726, 1322–1323, 1327, 1330–1332). But a job substantially equivalent to that held by each of them was filled by a new employee subsequent to the strikers' applications (B. A. 120; 703–709, 730, R. A. 465, 470–474).

The Board's order required petitioner to cease and desist from its unfair labor practices, to bargain collectively with the Union in the appropriate bargaining unit, to reinstate and make whole the strikers against whom petitioner had discrimi-

nated,[7] and to post appropriate notices (B. A. 4–8).

On April 20, 1944, the Board filed in the court below a petition to enforce its order (R. 1–5). On May 19, 1944, petitioner filed a motion for leave to adduce additional evidence concerning the condition and method of operation of its radio station, concerning alleged sabotage at the station, and concerning the bearing of such alleged sabotage upon its refusal to reinstate certain strikers (R. 5–60). The Board opposed the motion (R. 61–63), and the court below, on June 27, 1944, entered its order denying the motion (R. 63). On February 6, 1945, the court handed down its opinion upholding the Board's order (R. 64–67), and, on February 26, 1945, entered its decree enforcing that order (R. 68–71).

---

[7] The Board found discrimination against 31 employees (B. A. 1–2, 3–4, 115–123, 136, 145). Of these, 10 (Norman, Suchin, Steinberg, McDonald, Sokal, Garafalo, Corrado, Hopkins, Boley, and Ludlam), one of whom (Boley) had been accused of "sabotage" (B. A. 81–83; 972–974, 1302–1303, R. A. 347), were subsequently reemployed (B. A. 11, note 1, 115, 122–123; 981–983, R. A. 347, 465–474). The remaining 21 were never reinstated (B. A. 11, note 1, 12–14, 116; 730, R. A. 345–346). In this group were 14 (Study, Olsen, Wegge, Kamke, Berry, Alper, Polimeni, Potts, Graham, Dickens, Neuwirth, Kearney, Stratton, Ferri) whom petitioner allegedly refused reinstatement because of "sabotage" (B. A. 13, 81–82, 115; 972–974, 980–981, 1302–1303, 1320–1323). The other seven (Murgia, Tanzman, Murtaugh, Jones, Lowerbraun, Zappula, and Janowitz) either refused to accept less desirable positions than they formerly held or were denied reemployment on the ground that no

ARGUMENT

1. Petitioner contends (Pet. 9–10, 12–15, Br. 19–33) that there is a fatal variance between the complaint and the Board's findings. Petitioner further asserts that the fact of the discharges was conclusively established by the pleadings, was not an issue in the case, and was not litigated at the hearing. It urges that the Board's finding that there was no discharge of employees on November 3 or 4, but rather a refusal to reinstate them on or about December 6, is consequently at variance with the pleadings and cannot be sustained.

Certain of petitioner's employees went on strike. When they sought to return to work, petitioner refused to permit them to do so. As the facts summarized in the Statement (*supra*, pp. 3–14) demonstrate, petitioner had not replaced the strikers with permanent employees before it refused to bargain with the Union, and the real question in the case was whether the refusal to reinstate

---

work was available for them (B. A. 13–14, 116; 730, 1319, R. A. 345–346). The Board ordered petitioner to offer immediate and full reinstatement to 27 employees (B. A. 6, 8), and to make 29 employees whole by payment of back pay from December 5, 1940, the date of their application for reinstatement (B. A. 6–7, 8). Three employees (Suchin, Hopkins, and Norman) were laid off or discharged non-discriminatorily after their reinstatement (B. A. 2–3, 7). As to them the Board ordered no reinstatement but only back pay (B. A. 6–7, 8). The Board did not order any affirmative relief for Study (B. A. 3–4) and ordered reinstatement but no back pay for Janowitz (B. A. 3, 6).

the strikers was for cause or on account of the employees' union membership and concerted activities. It was a purely secondary and relatively minor matter whether the unlawful discontinuance of the employment relationship was first effected by a discharge on November 3 or 4 and a refusal to reinstate thereafter, as alleged in the complaint, or only by one of these acts—namely, by a denial of reinstatement on or about December 6, as found by the Board. All three questions—*why, when,* and *how* the strikers were prevented from resuming work—were fully investigated at the hearing, as the evidence summarized in the Statement (*supra,* pp. 5–14) demonstrates. Only the question *why* was really crucial, however, and as to it there was no variance between the complaint and the findings.

In any event, there is not a fatal variance between an allegation of violation of Section 8 (3) of the Act by discriminatory discharges on November 3 or 4, 1940, and refusal to reinstate thereafter, and a finding of violation of Section 8 (3) of the Act by discriminatory refusal of reinstatement on or about December 6, 1940. To be fatal a variance between the pleadings and the proof must be substantial and material and must have misled or surprised the defendant.[8] This Court

[8] *Nash* v. *Towne*, 5 Wall. 689, 698–699; *Washington & Georgetown Railroad Co.* v. *Hickey*, 166 U. S. 521, 531–532; *Baltimore & Potomac Railroad Co.* v. *Cumberland*, 176 U. S. 232, 237–238; *Berger* v. *United States*, 295 U. S. 78, 80–83; *Armand Co., Inc.* v. *Federal Trade Commission*, 84 F. 2d 973, 974–975 (C. C. A. 2), certiorari denied, 299 U. S. 597.

has held that strict rules of pleading and evidence do not apply in proceedings before the Board[9] and that a contention that there is a fatal variance between the pleadings and the proof is "highly technical."[10] Consequently, in Board cases, a variance between the pleadings and the proof is not fatal if the employer was fairly apprised of the general nature of the issues and had full opportunity to defend.[11]

There is no conflict between the decision of the court below and any of the cases cited by petitioner. In each case cited by petitioner in which the court found a fatal variance between the pleadings and the proof, the variance was substantial and material and misled or surprised one of the parties. Thus, for example, in *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, on which petitioner relies (Br. 22, 27), the finding of the Board which the Court set aside "as irrelevant to any issue in the cause" (p. 346) dealt with an

[9] *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229–230.

[10] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349.

[11] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349–351; *National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552, 557 (C. C. A. 6); *Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board*, 111 F. 2d 869, 873 (C. C. A. 7); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. 2d 432, 434–435 (C. C. A. 7); *National Labor Relations Board* v. *Yale & Towne Mfg. Co.*, 114 F. 2d 376, 379 (C. C. A. 2).

incident which had no connection with any allegation in the complaint. The complaint alleged discharge of the striking employees as a body, but the Board found a refusal to hire two strikers to be a violation of Section 8 (3) of the Act independent of any of the violations flowing out of the discharge and charged in the complaint. Likewise in *National Labor Relations Board* v. *Citizen-News Co.,* 134 F. 2d 962 (C. C. A. 9), also relied upon by petitioner (Br. 22–23, 26, 27, 28), the Board, apparently without notice to the respondent, found the respondent guilty of violating the Act in a manner not charged in the complaint, not litigated at the hearing, and not dealt with in the trial examiner's intermediate report.

In dealing with this question of variance between the complaint and the Board's finding, the court below held (R. 64–66) that the Board's finding of a discriminatory refusal to reinstate was, "in effect", a finding of discriminatory discharge and was, therefore, within the allegation of the complaint that petitioner discriminatorily discharged the employees in question "on or about" November 3 or 4. As petitioner notes (Pet. 10, 15, Br. 36–37), the Board had, however, dismissed the allegation in the complaint that petitioner had discriminatorily discharged any employees on or about November 3 and 4 (B. A. 7). The Board had instead based its finding upon the allegation in the complaint that petitioner had dis-

criminatorily refused to reinstate the employees in question after November 3 and 4 (B. A. 128–129).[12] The court's conclusion that there was no variance between the complaint and the Board's finding is, therefore, incorrect insofar as it is based upon the court's assumption that the Board had not dismissed the allegation in the complaint to the effect that petitioner discharged certain employees on or about November 3 and 4. The facts summarized in the Statement (*supra*, pp. 3–14) demonstrate, however, that petitioner knew what the issues were, was afforded a full opportunity to introduce evidence in support of its defense, and consequently was not prejudiced or surprised by the difference between the complaint and the Board's finding, adopting the finding of the trial examiner.[13]

---

[12] The finding, of course, merely indicated that there was insufficient evidence to support the allegation of discharge on November 3 or 4, but that there was ample basis for the averment of refusal to reinstate thereafter. The Board has on other occasions similarly found that only one portion of the complaint has been shown by the evidence to constitute a violation of Section 8 (3). See, e. g., *Matter of Poultrymen's Service Corp.*, 41 N. L. R. B. 444, enforced, 138 F. 2d 204 (C. C. A. 3).

[13] As shown above, there is no variance between the complaint and the Board's finding with respect to the only crucial question, namely, the *reason* for petitioner's refusal to permit the employees to return to work; and the only claim of variance between the complaint and the Board's finding with respect to the *method* of such refusal turns on the fact that the Board dismissed one part of the complaint in this regard and sustained the other part.

Moreover, as the court below noted (R. 65, 67), if petitioner considered itself prejudiced by the finding that there was no discharge on November 3 and 4, it had ample opportunity to apprise the Board or the court below by a motion to reopen the record for the purpose of taking additional evidence on this question. National Labor Relations Act, Section 10 (c), (d), (e); *Swift & Co.* v. *National Labor Relations Board,* 106 F. 2d 87, 91 (C. C. A. 10). While petitioner did make a motion to adduce evidence on the cause of the termination of employment, it never even claimed that it had any additional evidence as to the date on which or manner in which it took place. Consequently, as the court below correctly held (R. 64, 65–66), there was not a fatal variance. The fact that the court below gave a wrong reason for its holding that there was no fatal variance between the complaint and the Board's finding raises no question for review by this Court. It is well settled that the decision of a lower court will not be reversed if the result is correct even though the lower court may have relied upon a wrong ground or given a wrong reason. *Helvering* v. *Gowran,* 302 U. S. 238, 245; *J. E. Riley Investment Co.* v. *Commissioner of Internal Revenue,* 311 U. S. 55, 59; *Utah Copper Co.* v. *Railroad Retirement Board,* 129 F. 2d 358, 362 (C. C. A. 10), certiorari denied, 317 U. S. 687. Contrary to petitioner's contention (Pet. 10, 13–15, Br. 30), the court below did not mis-

construe and misapply *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. In the case at bar, as in the *Mackay* case, the company "understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory" (304 U. S. at 350).

Finally, admissions in the pleadings, like stipulations between the parties, cannot operate to prevent an adjudicatory tribunal from deciding a case on the facts as they really are. Cf. *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 288–289; *Arizona* v. *California*, 283 U. S. 423, 452. Thus petitioner's alleged grievance, founded on the concession in the pleadings, adds nothing to its allegation that there is a fatal variance.

2. Contrary to petitioner's contention (Pet. 11, 15–16, Br. 38–39), the Board and the court below did not abuse their discretion by denying petitioner's motions to adduce additional evidence of the condition and method of operation of petitioner's radio station, of alleged sabotage at the station, and of the bearing of such alleged sabotage upon petitioner's refusal to reinstate certain employees. The evidence sought to be introduced (R. 5–60) bears solely upon the credibility of one of petitioner's witnesses, Holt, on the collateral issue of whether the equipment at petitioner's station was tampered with on November 3–4, 1940. Petitioner asserted (R. 13–18, 24, 45–50) that the

proffered evidence would corroborate part of Holt's testimony at the hearing and would thereby establish the credibility of Holt's testimony concerning the alleged sabotage. The Board did not state, however, that it disbelieved the testimony of Holt as to the conditions characterized by him as "sabotage". Without determining whether any "sabotage" had in fact been committed, the Board found that petitioner's refusal to reinstate its striking employees was on account of their union membership and activities and not on account of the alleged commission of sabotage (B. A. 1–2, 128–129). The evidence sought to be introduced is, therefore, immaterial to any issue in this case. In addition, the proffered evidence is cumulative and merely tends to corroborate evidence already in the record. At the hearing before the Board, Holt himself testified at length concerning the condition and method of operation of petitioner's radio station and the alleged sabotage at the station (Statem , *supra,* pp. 11–13). The evidence sought to b duced was not newly discovered, and petitioner did not show any reasonable grounds for having failed to adduce it at the hearing before the Board.[14] An application to the

[14] The inaccuracy of petitioner's contrary statement (Br. 39) is apparent from a reading of its motion and an attached affidavit (R. 5–25). Petitioner's only excuse for having failed to adduce this evidence at the hearing was that it thought that the trial examiner had already been convinced (R. 17, 23). Certainly the Board and the court below were

Board or a court for leave to adduce additional evidence pursuant to the provisions of the National Labor Relations Act is addressed to the sound discretion of the Board or the court.[15] It was not an abuse of that discretion for the Board (B. A. 1) and the court below (R. 63) to deny petitioner's motion to adduce additional evidence.[16]

3. Petitioner's statement of subordinate questions involved (Pet. 11–12) raises only the issue of the substantiality of the evidence supporting some of the Board's findings. As petitioner concedes (Pet. 11), the questions "perhaps" are "not in themselves of sufficient importance or general interest to warrant" this Court's review. Moreover, the evidence summarized in the Statement (*supra*,

---

free to refuse to allow petitioner to try again, since it had already had its opportunity to show that certain of the strikers were responsible for the sabotage and had been discharged and refused reinstatement for that reason.

[15] *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104; *National Labor Relations Board* v. *Standard Oil Co.*, 138 F. 2d 885, 889 (C. C. A. 2).

[16] National Labor Relations Act, Section 10 (c), (d), (e); *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104–105; *Pittsburgh Plate Glass Company* v. *National Labor Relations Board*, 313 U. S. 146, 157–158, 161–162, affirming, 113 F. 2d 698, 702–703 (C. C. A. 8); *National Labor Relations Board* v. *Aluminum Products Company*, 120 F. 2d 567, 573 (C. C. A. 7); *Western Cartridge Company* v. *National Labor Relations Board*, 134 F. 2d 240, 244–245 (C. C. A. 7), certiorari denied, 320 U. S. 746; *National Labor Relations Board* v. *Weirton Steel Company*, 135 F. 2d 494, 497–498 (C. C. A. 3); *National Labor Relations Board* v. *Standard Oil Co.*, 138 F. 2d 885, 889 (C. C. A. 2).

pp. 5–14, and see note 4, *supra,* p. 7), furnishes ample support for the challenged findings, as the court below held.

CONCLUSION

The decision of the court below is correct. It gives rise to no conflict of decisions and involves no question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
FANNIE M. BOYLS,
MILLARD CASS,
Attorneys,
National Labor Relations Board.

MAY 1945.